No. 21706

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, ET AL.,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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JURISDICTIONAL STATEMENT

This action was brought against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., in the United States District Court for the Central District of California (R. 2-5).

On December 15, 1966, the district court denied the Government's motion to dismiss for lack of jurisdiction of the subject matter of the action and failure to state a claim upon which relief can be granted (R. 6-7, 42-50). 1/ On February 15, 1967, the district court denied the Government's timely motion for reconsideration but certified that its denial of the motion for reconsideration "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation" (R. 77-79). On March 23, 1967, this Court, pursuant to 28 U.S.C. 1292(b) and this Court's Rule 38, granted the Government's application for leave to take an interlocutory appeal (R. 102). Notice of appeal was filed on March 28, 1967 (R. 81).

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 et seq., by the personal representatives of two members of the Marine Corps who, while on active military duty and under military orders, were killed in the crash of an Air Force plane which was transporting them from El Toro Marine Corps Air Station, California, to Viet Nam (R. 2-5, 42). The complaint alleged that, although the United States Air Force operated the aircraft, the accident was caused by the negligence

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1/ The district court's memorandum of decision and order is reported at 261 F. Supp. 252.

of employees of the Federal Aviation Agency (hereinafter "FAA") in operating, maintaining and controlling the departure of the aircraft from the ground, and in giving inadequate terrain clearance information (R. 2-4).

The Government moved to dismiss the complaint on the ground that Feres v. United States, 340 U.S. 135, barred any Tort Claims Act suit to recover for servicemen's injuries incurred, as those at issue concededly were, "incident to service" (R. 6-7, 10-13). The district court denied this motion, rejecting as "no longer authoritative" (261 F. Supp. at 253-254), the Supreme Court's holding in Feres (340 U.S. at 146) that the Government is not liable under the Act for service-incident injuries to servicemen. The district court went on to hold that in its view servicemen's claims should be excluded from the Tort Claims Act only if "the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant" (261 F.Supp. at 256). Applying that test, the district court concluded that the instant claims are actionable under the Tort Claims Act since, so far as the FAA was concerned, the decedents "simply were two passengers in an airplane * * *" (261 F. Supp. at 257).

SPECIFICATION OF ERROR

The district court erred in holding that this Federal Tort Claims Act suit is not barred by the rule of Feres v. United States, 340 U.S. 135, 146, that "the Government is not liable

under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

STATUTE INVOLVED

The Federal Tort Claims Act provides in pertinent part:

28 U.S.C. 1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

ARGUMENT

THIS ACTION UNDER THE FEDERAL TORT CLAIMS ACT IS BARRED BY THE RULE OF FERES V. UNITED STATES, 340 U.S. 135, 146, THAT "THE GOVERNMENT IS NOT LIABLE UNDER THE FEDERAL TORT CLAIMS ACT FOR INJURIES TO SERVICEMEN WHERE THE INJURIES ARISE OUT OF OR ARE IN THE COURSE OF ACTIVITY INCIDENT TO SERVICE."

In Feres v. United States, supra, the Supreme Court held (340 U.S. at 146):

> that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.

There is no question but that, under this holding, the district court should have granted the Government's motion to dismiss, for it is undisputed that the servicemen involved were killed "in the course of activity incident to service." The district court recognized that Feres requires the dismissal of this suit, but declined to follow the holding in Feres, considering it "no longer authoritative" (261 F. Supp. at 253-254) insofar as it pertains to negligence assertedly committed by civilian employees of the United States.

The district court justified its decision by isolating various elements of the Supreme Court's opinion in Feres and suggesting that each of these has been enervated by subsequent decisions in other areas. Fastening upon dictum in United States v. Brown, 348 U.S. 110, the district court concluded (261 F. Supp. at 256) that a serviceman's right to sue his Government in tort "would not depend upon whether * * * [he

was] on active duty or on leave at the time of * * * [his] injuries," the line drawn in Feres. Instead, the district court ruled, the right to sue under the Tort Claims Act depends (ibid):

> upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. [Emphasis supplied.]

Thus, the district court substituted the status (civilian or military) of the alleged tortfeasor for the rule (status of the serviceman at the time of injury) adopted by the Supreme Court in Feres.

Even apart from consideration of whether such a piecemeal analysis ever may justify a lower court's deviation from a Supreme Court holding, the district court's decision in this case plainly was unwarranted, for the Supreme Court and the courts of appeals have consistently adhered to the Feres exclusion of all service-incident injuries, and Congress has acquiesced in that construction of the Tort Claims Act. This Court, in adhering to the Feres rule, has considered and expressly rejected the rationale underlying the district court's ruling. Callaway v. Garber, 289 F. 2d 171, certiorari denied, 368 U.S. 874. The Third Circuit has recently rejected the district court's reasoning in an action which was brought by representatives of other marines who died in the same crash as did the decedents here. Sheppard v. United States, 369 F. 2d 272, certiorari denied, 386 U.S. 982. And the test

which the district court substituted for that of Feres has also been considered and rejected by the Seventh Circuit. Layne v. United States, 295 F. 2d 433, certiorari denied, 368 U.S. 990.

A. The Feres decision involved three suits brought against the United States under the Tort Claims Act to recover for injuries sustained by servicemen in the United States armed forces as an incident to their military service. The Supreme Court, after a thorough analysis of the background and objectives of the Tort Claims Act, concluded (340 U.S. at 146):

> that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.

The Court thus emphasized that the relationship existing between the United States and its military personnel is one "distinctively federal in character," and that the application of local law to that relationship, by virtue of the Tort Claims Act, would be completely inappropriate. 340 U.S. at 143-144. Mr. Justice Jackson's opinion also stressed that the Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (340 U.S. at 139), and that it was thus highly relevant

that Congress had already provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144. 2/

Since Feres, the Supreme Court has decided only one case involving the question of a serviceman's right to sue under the Tort Claims Act. That case, United States v. Brown, 348 U.S. 110, was brought by a discharged veteran who had been the victim of medical malpractice after his release from service. Holding that the suit was not controlled by Feres, since the injury had not been incurred "incident to service," the Supreme Court expressly said (348 U.S. at 113):

> We adhere * * * to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty.

2/ The concept of "service-incident" injury upon which the Feres decision relied was not a wholly novel one formulated by the Court for the purposes of that decision, but was, instead, one which found a ready context within the framework of workmen's compensation statutes. The Court's likening of military benefits to workmen's compensation benefits and its statement that "most states have abolished the common-law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability" (340 U.S. at 143-146), make it clear that the Court contemplated definition of the phrase "incident to service" in terms of the workmen's compensation concept of "course of employment." See, also, United States v. Forfari, 268 F. 2d 29, 33-34 (C.A. 9), certiorari denied, 361 U.S. 902. Of course, the "course of employment" concept of workmen's compensation is not limited to injuries inflicted by fellow employees or otherwise dependent upon the status of the tortfeasor. See, e.g., O'Leary v. Brown-Pacific-Maxon, 340 U.S. 504, 506-507; Larson, Workmen's Compensation Law, §§ 9.40-9.50, 11.32(b) (1966). Thus, it is clear that the status-of-the-tortfeasor test employed by the district court is fundamentally at odds with the Feres ruling.

In the face of the Supreme Court's explicit "adherence" to the line drawn in Feres, the district court concluded that Brown and Feres were inconsistent, and derived from Brown a substitute for the Feres rule. The district court's thesis was that the veteran in Brown, like the servicemen in Feres, was eligible for compensation; therefore, the court reasoned, the availability of compensation did not, as Feres held it did, indicate that Congress had not intended to provide servicemen with a supplemental Tort Claims Act remedy (261 F. Supp. at 255).

Where the district court went astray, we think, was in misinterpreting what the Supreme Court said in Brown. By Brooks v. United States, 337 U.S. 49, and Feres, the Supreme Court had drawn the line between injuries that were, and those that were not, incurred "incident to service." In Brown, the Court expressly adhered to that line. The servicemen in Brooks and Brown, like those in Feres, were eligible for compensation; but the servicemen whose injuries had not been incurred "incident to service" were permitted to sue under the Tort Claims Act because their suits would not present the peculiar problems raised by suits based upon injuries that were incurred incident to service. The Court explained this distinction in Brown (348 U.S. at 112):

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read that Act as excluding claims

That is not, as appellees would have it, an alteration of Feres; it is, rather, simply an explanation of Brooks and Brown; it gives the reasons why servicemen injured outside the "course of military duty" are exempt from the general rule that where compensation has been provided, tort suits may not be maintained. Although the rule of non-liability to servicemen injured "incident to service" is designed to avoid interference with military discipline, the Supreme Court has never indicated that Feres should be limited to situations which pose a direct threat of interference with military discipline. 3/

3/ Moreover, even if the language of Brown constituted a limitation of the Feres rule (which it does not), this Tort Claims Act suit would not be maintainable. When appellees' decedents boarded the military airplane, they did so under the compulsion of military orders, and were at all times subject to the discipline of the military personnel in charge of the airplane, as well as to the commands of their superiors aboard the craft. Thus, the considerations of discipline which in part underlie the rule of Feres are strikingly present here. Despite the fact that the allegedly negligent persons were not members of the armed service, they were engaged in the performance of a service for the military -- participating in the take-off of an Air Force plane from a military base. Thus, even in the district court's terms, the deaths here in issue "stemmed from activities that involved an official military relationship between the negligent person and the claimant." It is also clear that appellees' allegations would require an inquiry into military affairs if this suit was allowed and that the mere possibility of such a suit and inquiry poses a threat to military discipline.

In Feres, itself, the threat to military discipline was far less direct than it is here. The three cases decided in Feres involved a sleeping soldier who died due to alleged negligence in maintaining a defective heating plant and failing to maintain an adequate fire watch, and two soldiers injured by alleged medical malpractice. The necessity of maintaining discipline while soldiers are sleeping, or on operating tables, is far less clear than the necessity of maintaining discipline among soldiers being transported for military purposes in military aircraft under the control of military authorities.

The viability of Feres is confirmed by the Supreme Court's consistent application of its rationale in analogous situations, holding that where Congress has provided a form of administrative compensation for Government employees injured in the performance of their duties, the availability of such a remedy precludes recourse to a tort suit against the Government. Johansen v. United States, 343 U.S. 427; Patterson v. United States, 359 U.S. 495. Only this past Term, the Court reviewed and reaffirmed those decisions, holding that federal prisoners who are eligible for compensation are thereby precluded from suing under the Tort Claims Act. United States v. Demko, 385 U.S. 149, 151 (footnote omitted):

> Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. * * * Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws.

Demko illuminates the inapplicability of the decision upon which the district court here also relied, United States v. Muniz, 374 U.S. 150, [4/] where "neither of the two prisoners * * * was covered by the prison compensation law." 385 U.S. at 153. Indeed, in Muniz, the Court expressly noted that it found "no occasion to question" the holding in Feres. 374 U.S. at 159.

4/ 261 F. Supp. at 255-257.

In short, the Supreme Court never has deviated from the rule of Feres: that the right to maintain a Tort Claims Act suit based on injuries incurred by a serviceman depends upon whether the injuries were incurred "incident to service." In Brown, as in Feres and Brooks, the determinative factor was the status of the victim.[5/] Only if the serviceman's injuries were incurred outside the "course of military duty" can his military status be considered so tenuous that he is brought within the compass of the Tort Claims Act.

B. The Supreme Court's satisfaction with the rule laid down in Feres has been echoed in Congress. In Feres, the Supreme Court emphasized that "if we misinterpret the Act, * * * Congress possesses a ready remedy." 340 U.S. at 138. But Congress has acquiesced in the holding of Feres, permitting the decision to stand undisturbed for more than fifteen years. This fact points up the impropriety of the district court's alteration of Feres; given such congressional concurrence, even the Supreme Court would hesitate to overturn its decision:

> When the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy

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5/ In Brooks, the Court considered irrelevant the fact that the Brooks' injury had been caused by the negligence of a civilian employee of the Army. Founding its decision on the servicemen's status, the Court said: "Were the accident incident to the Brooks' service, a wholly different case would be presented." 337 U.S. at 52. Similarly, Feres and Brown turned exclusively on the status of the injured servicemen; the status of the alleged tortfeasors was irrelevant.

> at any time, and in these circumstances reversal is not readily to be made [United States v. South Buffalo R. Co., 333 U.S. 771, 774-775; Patterson v. United States, 359 U.S. 495, 496]. 6/

C. The courts of appeals, like the Supreme Court, have adhered "to the line drawn in the Feres case." As, indeed, the district court recognized (261 F. Supp. at 256-257), this Court previously has considered and expressly rejected the reasoning which underlies the district court's ruling. In Callaway v. Garber, 289 F. 2d 171, certiorari denied, 368 U.S. 874, an Air Force officer en route to a training school by private automobile was killed as a result of a collision on a public highway with a vehicle negligently driven by a Navy officer. Since the death was incurred in the course of activities "incident to service," the case fell squarely within the holding of Feres, but did not seem to fit the explanation offered in Brown. This Court decided the case in accordance with Feres, holding that the Tort Claims Act suit could not be maintained (289 F. 2d at 173-174):

> The instant case can find no shelter within those reasons [in Brown], since the negligent and injured parties here were members of different branches of the service and were engaged in entirely different

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6/ See, also, Preferred Ins. Co. v. United States, 222 F. 2d 942, certiorari denied, 350 U.S. 837, where this Court, speaking of the Feres case, stated (id., at 945):

> The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to congressional intent in the adoption of the Act.

> and unconnected activities at the time of the accident. However, the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case. 7/

The district court's ruling is also directly contrary to the Seventh Circuit's decision in Layne v. United States, 295 F. 2d 433, certiorari denied, 368 U.S. 990, a case strikingly similar to this suit. There, the widow of an Air National Guardsman sought Tort Claims Act recovery for his death on a training flight, which allegedly had been caused by the negligence of civilian employees of the United States -- the control tower operators. Plaintiff specifically contended that her suit was not barred by Feres because the alleged negligence was that of civilian control tower operators rather than of other military personnel. 8/ The court, however, found this and other arguments of the plaintiff to be "lacking in merit," and dismissed the suit on the ground that the death occurred "as an incident to military service" (295 F. 2d at 436).

7/ The district court refused to follow this Court's decision in Callaway v. Garber, supra, holding that "the negation of the Feres rule * * * has been provided by the later Muniz decision" (261 F. Supp. at 256-257). However, as shown above (supra, p. 11) the district court's reliance upon Muniz was plainly misplaced.

We note that a decision of this Court rendered subsequent to Muniz is in accord with Callaway v. Garber, supra. In United Air Lines, Inc. v. Wiener, 335 F. 2d 379, 396-398, 402, 404, petition for a writ of certiorari dismissed, 379 U.S. 951, this Court held that the Government was not liable under the Federal Tort Claims Act for injuries to servicemen which arose out of activities "incident to service," even though the Government's liability was predicated, in part, upon negligence of employees of the Civil Aeronautics Administration (the predecessor of the FAA).

8/ Brief of Plaintiff-Appellant, pp. 5, 11, 32-34, 37; Reply Brief of Plaintiff-Appellant, pp. 2-3, 6-9.

We also draw the Court's attention to the recent decision of the Third Circuit in Sheppard v. United States, 369 F. 2d 272, certiorari denied, 386 U.S. 982. That suit was brought by representatives of marines killed in the same crash as were the decedents of appellees here. The complaint in Sheppard alleged that the crash had been caused by the negligence "of defendant's agents, servants, and employees, to wit, members of the United States Air Force and others * * *." (Emphasis supplied.) [9/] Much in the vein of the appellees here, the plaintiffs in Sheppard argued that, although Feres had not been specifically overruled, subsequent Supreme Court cases had "destroyed the validity of that case," and that, in any event, Feres should be limited to situations that "pose a threat to military discipline." [10/] Rejecting both contentions, the court of appeals ruled (id., at 272):

> We hold that the ruling of the District Court was right and proper. Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L. Ed. 152 (1950). The bald statement is made on behalf of appellants in their brief that "* * * subsequent decisions of the Supreme Court destroyed the validity of that case." Nothing could be further from the true fact. Appellants argue from decisions having no real bearing on the tight, clear problem presented. In the only other case since Feres involving the right of a service man to sue the United States in tort, United States v. Brown, 348 U.S. 110, 113, 75 S.Ct. 141, 144, 99 L.Ed. 139 (1954), Mr. Justice Douglas for the Court states "We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty."

9/ ¶4 of the complaint, reproduced at page 2a of appellants' appendix in Sheppard.

10/ Brief of Appellants, pp. 1, 8-21, 21-31.

It is apparent from the cases just cited, and other decisions, [11] that the courts of appeals have consistently applied the Feres rule in all cases involving injuries incurred "incident to service," regardless of the lack of an

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11/ E.g., in Preferred Ins. Co. v. United States, supra, 222 F. 2d 942, a Tort Claims Act suit to recover for property damage sustained when an Air Force plane crashed into the trailers of enlisted men and officers located on the base, this Court held that, although "[t]he owners of the damaged trailers had no duties whatever with respect to the maintenance, servicing, loading, operation, dispatch or control of the plane which crashed," the Feres rule barred the suit since "the damage to the trailers of the servicemen arose out of and was in the course of activity incident to their military service" (id., at 943, 948). In Chambers v. United States, 357 F. 2d 224 (C.A. 8), the court ruled that Feres barred a Tort Claims Act suit to recover for the death of an airman killed while swimming at a pool on an Air Force base as the result of alleged negligence in the maintenance of the pool. The court held that it was irrelevant that the decedent "might have had a furlough order in his pocket or might have been engaged in swimming for recreation" (id., at 229). In Zoula v. United States, 217 F. 2d 81 (C.A. 5), the court held that Feres barred a Tort Claims Act suit to recover for injuries suffered by military students who, while touring an Army base, were struck by an army ambulance, and that it was irrelevant that they were not "injured as a result of, or while acting under, immediate and direct military orders" (id., at 84). See, also, United States v. Carroll, 369 F. 2d 618 (C.A. 8), where the court stated that "in every case subsequent to Feres, involving the Government's liability to servicemen under the Federal Tort Claims Act, supra, the determinative issue has been whether the injuries "'arise out of or are in the course of activity incident to service'" (id., at 620).

See, also, Archer v. United States, 217 F. 2d 548, certiorari denied, 348 U.S. 953, where this Court held that "a cadet riding under military discipline on an army plane under control of a superior officer" has no claim under the Tort Claims Act "for injury sustained through whatever cause" (id., at 551). "This principle," the Court stated, "would not vary even though the service man were on leave and whether he were on the plane voluntarily or by command. He was in line of duty. * * * The allegations set out [in the complaint] would indicate the usual transportation of a soldier in military service in line of duty. The Tort Claims Act does not cover such a situation" (ibid).

(Continued on next page)

"official military relationship" between the claimant and the alleged tortfeasor, or of an immediate threat to military discipline. Thus, the district court's order stands alone in conflict with the views of the Supreme Court, Congress, and this as well as other courts of appeals.

CONCLUSION

For the reasons stated, the district court's order should be reversed and judgment entered in favor of the appellant dismissing the complaint.

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(Continued from preceding page)

Cf. Van Sickel v. United States, 285 F. 2d 87, where this Court rejected the contention that a serviceman's representatives were not barred by the Feres rule because the state wrongful death statute gave them a right of action independent of that existing in the serviceman before death. The Court ruled that if Feres was to "be restricted so as to permit recovery in cases of the type of the instant case, such restriction should be made by the Supreme Court and not by this Court" (id., at 91).

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief for the appellant is in full compliance with those rules.

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AFFIDAVIT OF SERVICE

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LEONARD SCHAITMAN, being duly sworn, deposes and says:

That on September 20, 1967, he caused three copies of the foregoing Brief for the Appellant to be served by air mail, postage prepaid, upon counsel for appellees:

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Subscribed and Sworn to before me
this 20th day of September, 1967.
[Seal]